IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-253

No. COA20-315

Filed 1 June 2021

Haywood County, Nos. 19 CRS 204–05

STATE OF NORTH CAROLINA

v.

PRESTON SPENCER ALEXANDER

Appeal by defendant from judgment entered 23 October 2019 by Judge Marvin P. Pope Jr. in Haywood County Superior Court. Heard in the Court of Appeals 23 March 2021.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy L. Bircher, for the State.*

*Kimberly P. Hoppin for defendant.*

DIETZ, Judge.

¶ 1 Defendant Preston Spencer Alexander appeals his convictions for second degree kidnapping, communicating threats, and assault with a deadly weapon, all stemming from a violent attack on his girlfriend. Over several hours, Alexander stripped his girlfriend naked, confined her against her will, repeatedly beat her, held a knife to her throat and told her he was going to kill her, and strangled her with

such force that she could not breathe and believed she was about to die. Ultimately, Alexander's girlfriend was able to escape, naked and bloody, to a neighbor's apartment, where the neighbors called the police.

¶ 2 Alexander challenges the sufficiency of the evidence on the kidnapping charge, the jury instruction on assault with a deadly weapon, and the admission of various evidence against him. As explained below, the trial court properly denied the motion to dismiss because the State presented sufficient evidence of a separate restraint apart from the underlying assaults, and sufficient evidence of each alternative theory of kidnapping. The trial court also properly instructed the jury that the knife Alexander held against his girlfriend's throat was a deadly weapon as a matter of law. Finally, Alexander has not shown a reasonable possibility that the jury would have reached a different verdict in the absence of the testimony he challenges on appeal. Accordingly, we find no error in the trial court's judgment.

## Facts and Procedural History

¶ 3 On 14 March 2019, Defendant Preston Alexander lived in an apartment with Stephany Russ and her two young children. Alexander had been drinking that day. That night, after Russ's children went to bed, Alexander and Russ were upstairs in her bedroom. Alexander asked Russ if she "wanted to be his girl." She responded, "Yes," and Alexander hit her across the face. Alexander then asked Russ other questions including whether she was "talking to anybody else" and continued to

smack and punch Russ in her face and ears.

¶ 4 Alexander made Russ take her clothes off and then pushed her up against the wall, held a knife to the side of her neck, and asked if she "valued [her] life." After Russ responded, "Yes," Alexander took the knife away from her neck, threw her on the bed, and continued punching her. Russ tried to put her arms up to protect herself, but Alexander "kept grabbing them and putting them down."

¶ 5 At some point, Russ ended up on the floor of her bedroom with Alexander on top of her. Alexander put his hands around Russ's neck and began squeezing. Russ stopped breathing for "about five, ten seconds" before she was able to get his hands off her neck. Russ believed Alexander was going to kill her. Ultimately, Russ was able to get out from under Alexander and attempted to get her phone to call 911, but Alexander would not let her reach her phone, telling her that if she "called the police, that it would do no good" because she "would be dead."

¶ 6 Alexander told Russ to go look at herself in her bathroom mirror. Russ saw that "it looked like there was a tennis ball in the side of [her] face" where Alexander had struck her. Alexander told her that the other side of her face "was going to look like that" because he was not done yet. Russ also had injuries to her ankle that she believed came from when she was on the ground and Alexander was "stomping" and "kicking" her.

¶ 7 After several hours, Russ was finally able to escape her apartment when

Alexander was not looking. She was still naked and bloody and ran to her neighbor's apartment. The neighbor gave Russ a hairdresser's poncho to cover her naked body and then called 911. Police and emergency responders arrived on the scene. Police arrested Alexander, took photos of Russ's injuries, and then took her to the hospital.

¶ 8 The State charged Alexander with second degree kidnapping, communicating threats, assault with a deadly weapon, assault on a female, and assault by strangulation. Alexander pleaded guilty to assault on a female and the other charges went to trial. Alexander moved to dismiss the kidnapping charge, but the trial court denied the motion. The jury convicted Alexander of second degree kidnapping, communicating threats, and assault with a deadly weapon. The jury acquitted Alexander of assault by strangulation. The trial court consolidated the convictions and sentenced Alexander to 29 to 47 months in prison. Alexander appealed.

## Analysis

### I. Denial of motion to dismiss the kidnapping charge

¶ 9 Alexander first argues that the trial court erred in denying his motion to dismiss the second degree kidnapping charge. He contends that the State failed to present sufficient evidence of confinement or restraint separate from that inherent in the assault and failed to present sufficient evidence that the confinement or restraint was for the purpose of committing assault by strangulation.

¶ 10 "This Court reviews the trial court's denial of a motion to dismiss *de novo*."

*State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980).

¶ 11 We first address Alexander's argument that the "evidence does not support a finding that Ms. Russ was imprisoned in a given area apart from the assaultive contact or that her freedom of movement was restricted apart from the assaultive contact."

¶ 12 For the charge of kidnapping, "the State must prove that defendant unlawfully confined, restrained, or removed the victim for one of the specified purposes outlined" in N.C. Gen. Stat. § 14-39. *State v. Rodriguez*, 192 N.C. App. 178, 187, 664 S.E.2d 654, 660 (2008). However, to avoid a violation of "the constitutional prohibition against double jeopardy," our Supreme Court has held that the charge of kidnapping for the purpose of committing another felony requires evidence of "a restraint separate and apart from that which is inherent in the commission of the other felony." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978).

¶ 13 Here, the State's evidence readily satisfied this standard. The State presented evidence that, when Alexander began assaulting Russ, he "stripped her naked so that she would be afraid to run out of the house and get help." Russ was then trapped in her apartment with Alexander for a period of several hours. Russ testified that she was not able to get away sooner because whenever she attempted to leave, Alexander would hit or punch her, or hold her to the ground. Russ also testified that Alexander prevented her from getting her phone to call for help, warning that she "would be dead" before police could get there. Ultimately, Russ was forced to escape and flee naked to her neighbor's apartment. This is substantial evidence of a restraint separate from that inherent in the charged assaults. *See State v. China*, 370 N.C. 627, 635–36, 811 S.E.2d 145, 150–51 (2018).

¶ 14 We next turn to Alexander's assertion that, even if there was evidence of a separate confinement or restraint, there was insufficient evidence to "support the theory that [he] confined or restrained Ms. Russ with the purpose of committing assault by strangulation." Again, the State's evidence was sufficient to support this theory of kidnapping.

¶ 15 Despite Alexander's ultimate acquittal on the assault by strangulation charge, there was ample evidence from which a reasonable jury could have found that the kidnapping was for the purpose of committing assault by strangulation. The State's evidence indicated that, after making Russ strip naked to prevent her from leaving

and striking her repeatedly, Alexander pinned Russ to the ground and put his fingers around her neck, squeezing her throat so hard that she stopped breathing and thought she was going to die. Witnesses observed injuries to Russ's neck and the State presented photos of those injuries. This was sufficient evidence to submit the kidnapping charge to the jury on the theory that Alexander restrained Russ for the purpose of committing assault by strangulation. *State v. Bell*, 359 N.C. 1, 26–27, 603 S.E.2d 93, 111 (2004).

¶ 16 Accordingly, we hold that the trial court did not err by denying Alexander's motion to dismiss.

**II. Jury instruction that knife was a deadly weapon as a matter of law**

¶ 17 Alexander next argues that the trial court committed plain error by instructing the jury that the knife he used in the assault was a deadly weapon as a matter of law because "a reasonable jury could determine that under the circumstances and manner of use, [Alexander's] pocketknife was not a deadly weapon as a matter of law."

¶ 18 Alexander concedes that he did not object to the challenged portion of the jury instructions and thus we review solely for plain error. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after

examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* In other words, the defendant must "show that, absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335. Plain error "is to be applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 518, 723 S.E.2d at 334.

¶ 19 A deadly weapon is "any instrument which is likely to produce death or great bodily harm, under the circumstances of its use." *State v. Palmer*, 293 N.C. 633, 642, 239 S.E.2d 406, 412 (1977). With respect to knives, "the evidence in each case determines whether a certain kind of knife is properly characterized as a lethal device as a matter of law or whether its nature and manner of use merely raises a factual issue about its potential for producing death." *State v. Walker*, 204 N.C. App. 431, 444, 694 S.E.2d 484, 493 (2010).

¶ 20 "The key element in determining whether or not a weapon is deadly *per se* is the manner of its use: The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself." *State v. Batchelor*, 167 N.C. App. 797, 800, 606 S.E.2d 422, 424 (2005). When "the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly" is one that the Court must declare as a matter of law. *Id.*

¶ 21 In *State v. Roper*, for example, we found that a pocketknife that was "slapped across the victim's throat" was "likely to produce great bodily harm" and thus was a deadly weapon as a matter of law. 39 N.C. App. 256, 257–58, 249 S.E.2d 870, 871 (1978). Similarly, in *State v. Torain*, our Supreme Court held that the trial court properly instructed the jury that a box cutter was a deadly weapon as a matter of law where the evidence showed the victim was a "woman wearing only a thin bathing suit" and "the defendant held the box cutter against [the victim's] unprotected neck" while he "threatened to kill her." 316 N.C. 111, 122, 340 S.E.2d 465, 471 (1986). In this context, the Court explained, the "dangerousness" of the knife was "manifest beyond question." *Id.* Simply put, in circumstances where "a slight movement of defendant's hand" towards the victim "clearly could have resulted in death or great bodily harm," the trial court does "not err by instructing that the weapon was dangerous *per se*." *State v. Wiggins*, 78 N.C. App. 405, 407, 337 S.E.2d 198, 199 (1985).

¶ 22 Here, the trial court instructed the jury that the "knife is a deadly weapon." Admittedly, the knife at issue was described as a "pocketknife" but, although the exact size of the knife is not clear from the record, the State described it at trial as "a substantial knife" and "not a tiny little Swiss Army pocketknife." More importantly, Russ testified that, while she was naked, Alexander pushed her up against a wall and held the knife to her neck. While the knife was against Russ's neck, Alexander asked Russ if she valued her life. After Russ answered him, Alexander removed the knife

from her neck, threw her down, and continued to assault her. There also was evidence of injuries to Russ's neck that looked like they were caused by "something sharp."

¶ 23 This evidence was sufficient for the jury to conclude that Alexander held a knife to Russ's bare neck while she was naked and pushed up against a wall, that he threatened to kill her at that time, and that Russ suffered injuries from that knife while it was held at her neck. The use of a knife in this manner renders the knife a deadly weapon *per se* under long-standing precedent from our appellate courts. *Roper*, 39 N.C. App. at 257–58, 249 S.E.2d at 871; *Torain*, 316 N.C. at 122, 340 S.E.2d at 471; *see also Wiggins*, 78 N.C. App. at 407, 337 S.E.2d at 199.

¶ 24 Alexander also argues that the trial court should have instructed the jury on the lesser-included offense of simple assault because the jury reasonably could have found that Alexander "committed the admitted assault without a deadly weapon." But a trial court does not err in failing to instruct on the lesser-included assault offense where the court properly concluded that the weapon used was a deadly weapon as a matter of law. *State v. Spencer*, 218 N.C. App. 267, 270, 720 S.E.2d 901, 903 (2012). Accordingly, we hold that the trial court did not err—and certainly did not plainly err—by instructing the jury that the knife was a deadly weapon as a matter of law. *Wiggins*, 78 N.C. App. at 407, 337 S.E.2d at 199.

## III. Admission of testimony that Alexander was in a gang

¶ 25 Alexander next contends that the trial court erred by "allowing irrelevant

testimony" that Alexander was a member of a gang. We reject this argument.

¶ 26 "The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000) (citation omitted). "Evidence of gang membership is generally inadmissible unless it is relevant to the issue of guilt." *State v. Privette*, 218 N.C. App. 459, 480, 721 S.E.2d 299, 314 (2012). But the improper admission of irrelevant evidence is not reversible error unless the defendant shows that the error was prejudicial. *State v. Babich*, 252 N.C. App. 165, 172, 797 S.E.2d 359, 364 (2017). Evidentiary error "is not prejudicial unless there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." *Id.*

¶ 27 Here, Alexander objected when Russ's neighbor testified that, as her husband was preparing to go next door to Russ's apartment, Russ said, "No, he's in a gang and he has a knife." Later, without objection from Alexander, Russ's neighbor read aloud from her written statement to law enforcement, which included her statement that "my husband wanted to go over to [Russ's] apartment to get her boys, and [Russ] said, 'No, I wouldn't do that. He has a knife and he is in a gang.'"

¶ 28 We need not address whether the neighbor's testimony was relevant and admissible because, in light of the other overwhelming evidence against Alexander

and the relative insignificance of the challenged evidence, we find that Alexander cannot show a reasonable possibility that the admission of this evidence impacted the jury's verdict. *Id.*

¶ 29 In this case, other evidence showed that Alexander made Russ strip naked so that she could not leave and then violently beat her for several hours. Russ testified in graphic detail about how Alexander assaulted her. The severity of her resulting injuries and the damage caused to her apartment were corroborated by several witnesses and by photographic evidence. Alexander admitted to the responding officers that he had "laid hands on her," explaining that he got mad because he believed Russ lied to him. In his own trial testimony, Alexander denied certain details of Russ's account but conceded that he blacked out and didn't recall what had happened. He admitted that he and Russ were arguing, asserting that she spit on him, and then he "went to a whole other level." But after that point, he had "no recollection." Alexander acknowledged that he "admitted to the assault" to a responding officer because he knew he "was in the wrong." Considering this overwhelming evidence of Alexander's guilt, he cannot show a reasonable possibility that these passing references to gang membership impacted the jury's verdicts. *Id.*

## IV. Admission of testimony about trauma to witness

¶ 30 Finally, Alexander argues that the trial court erred "by allowing irrelevant testimony about the trauma" to Russ's neighbor as a result of witnessing the severity

of Russ's injuries.

¶ 31 Again, this evidentiary argument amounts to reversible error only if Alexander shows a reasonable possibility that, but for the challenged testimony, the jury would have reached a different result. *Id.*

¶ 32 Here, Russ's neighbor testified that the events of that night "really traumatized me. I didn't expect to see somebody standing there naked and covered in blood when I opened the door." In tears, the neighbor then told the jury, "I'm so sorry. I have never seen anything like that before. And it was actually two days before my daughter's birthday. It was like a horror movie. I keep replaying it in my head sometimes. It was so scary."

¶ 33 As with Alexander's other evidentiary challenge, we need not address the merits of this issue because Alexander cannot show prejudice. Given the overwhelming nature of the other evidence of Alexander's guilt, including photographic evidence and other testimony describing the severity of Russ's injuries, there is no reasonable possibility that, without the neighbor's description of how the events impacted her, the jury would have returned a different verdict. *Id.*

**Conclusion**

¶ 34 We find no error in the trial court's judgment.

NO ERROR.

Judges GORE and GRIFFIN concur.

Report per Rule 30(e).